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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

DR. ARNOLD M. LANDSBOROUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The petitioner, Dr. Arnold M. Landsborough, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 12, 1948 affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is attached to and made a part of the transcript of proceedings of said Court for certiorari application. See certified copy of record of proceedings of the case, page 77.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1948 upon denial of Appellant's Petition for Re-Hearing. Jurisdiction of this Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; also Act of March

8, 1934 and Rule XI of the Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District Court of Columbia, promulgated May 7, 1934. 292 U. S. 661, 666.

This Petition has been filed within the statutory period of thirty days after judgment, provided for by the Act of March 8, 1934 and Rule XI of the Rules of Practice and Procedure above mentioned.

STATUTE INVOLVED.

Paragraph (a) of Section 2553, Title 26, U. S. C. A. is copied in the Statement of Facts, together with the indictment.

QUESTIONS PRESENTED.

First.

Should the Trial Court have withdrawn the testimony from the Jury and have discharged the defendant, or have instructed the Jury to discharge the defendant, there being no evidence to prove the allegations of the indictment.

Second.

Should the conviction in this case be reversed since the evidence fails to show the issue and use of a search warrant and warrant to arrest.

STATEMENT OF FACTS.

Petitioner herein, Dr. Arnold M. Landsborough, was tried and convicted in the District Court of the United States, Northern District of Ohio, Eastern Division, Judge Paul Jones presiding, on the following indictment:

> "On or about January 20, 1947, in the Eastern Division of the Northern District of Ohio, Dr. Arnold M. Landsborough did knowingly, willfully, unlawfully, and feloniously purchase a derivative of opium, to-wit:

forty (40) one-quarter grain Morphine Sulphate tablets, the same not being in the original stamped package, in violation of Section 2553, Title 26, United States Code."

This indictment was based upon Section 2553 Title 26, U. S. C. A.

"Packages."

"(a) General requirements. It shall be unlawful for any person to purchase, sell, dispense or distribute any of the drugs mentioned in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax * * *."

At all times mentioned herein, Dr. Arnold M. Landsborough, Petitioner herein, was a duly licensed and practicing physician and surgeon located in the Village of Garrettsville, Ohio and on January 20, 1947 was recuperating in his home there from disability and illness resulting from a fractured hip bone. While Dr. Landsborough was in the kitchen of his home on the afternoon of the above date, two Federal Narcotic Agents walked in, questioned and arrested him and confiscated a small clear glass bottle which the Agents claimed contained approximately 40 Morphine tablets and also confiscated his automobile. No search warrant or warrant for the arrest were produced or used and no receipt was given Dr. Landsborough for the property taken.

To the above indictment, Petitioner pleaded "Not guilty."

At the trial, the Agents testified that they had under investigation, one George Bishop, and had followed him

while he was operating Petitioner's automobile to the home of Petitioner.

Agent McDonald testified that Bishop told him he had gotten some drugs for himself on this trip. (Record page 11.)

Agent Ripberger testified that the alleged drugs so confiscated were not part of the drugs obtained at the drugstore in Cleveland by Bishop on that day. (Record page 25.)

At the end of the testimony on behalf of the Respondent, Petitioner moved that the Court withdraw the testimony from the Jury and instruct it to return a verdict for the Petitioner on the ground that the allegations of the indictment had not been proven. (Record page 30.)

The Trial Court took the above motion under advisement with this statement—"the indictment does however charge purchase. Up to date, there is not any evidence of purchase." (Record page 31.)

The defense was then required to proceed and Petitioner's evidence was to the effect that the drugs confiscated were legally obtained by his wife upon a prescription from a Dr. Deyell, his attending physician.

Dr. Landsborough denied that he had received narcotics from or through George Bishop. His further testimony, supplemented by that of Mrs. Catherine Landsborough, his wife, was to the effect that the morphine tablets prescribed for him by Dr. Deyell, on January 13, 1947, and which Mrs. Landsborough secured in the local drug store, had been removed by her from the original stamped cardboard package to prevent breakage when being carried, as they were preparing to leave on a trip to Florida.

Two prominent local business men testified as to Petitioner's good character and reputation.

At the close of all the evidence, counsel for Petitioner renewed his motion that the Court withdraw the testimony from the Jury and discharge the defendant for the reason that the indictment charged him with the purchase of mor-

phine tablets, whereas, the Respondent had failed to offer any proof of any purchase by said Petitioner. This motion the Court overruled and exceptions were taken.

After arguments of counsel and the Court's charge, the case was submitted to the Jury which returned a verdict of "Guilty." Petitioner was sentenced to imprisonment for a period of fifteen months. No costs were assessed.

From this verdict and judgment, Dr. Landsborough appealed to the Circuit Court of Appeals, Sixth Circuit, which affirmed the judgment of the District Court.

REASONS WHY CERTIORARI SHOULD BE GRANTED.

(1) Petitioner was indicted and convicted on a charge of purchase of contraband and Respondent offered no evidence to sustain that charge.

(2) The phrase in the Statute to the effect that possession of contraband is "prima facie evidence of the violation" was improperly given the same effect by the Trial Court as if Respondent had offered evidence of purchase.

(3) The presumption created in the statute involved, by the alleged possession of contraband, merely required Petitioner to explain that possession, and the explanation offered by Petitioner did not strengthen Respondent's case, but controverted it so that there was no evidence of Petitioner's guilt to submit to the Jury and the Court should have granted Petitioner's motion for judgment.

(4) The Circuit Court of Appeals for the Sixth Circuit in this case has decided an important question of Federal criminal law, namely, the right of Government Agents to enter and search a home and to arrest without warrant therefor, all in probable conflict with the decisions of this Court in the case of *United States v. DiRe*, 332 U. S. 581; *Anne Johnson v. United States of America*, #329, October Term, 1947, decided February 2, 1948 by this Court; *Jack Trupiano, et al. v. United States of America*,

#427, October Term, 1947, decided June 14, 1948 by this Court.

Respectfully submitted,

HAL H. GRISWOLD,
Counsel for Petitioner,
Dr. Arnold M. Landsborough.

GRISWOLD, LEEPER, MILLER & CORRY,
WAYNE E. MILLER,
Of Counsel.

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

DR. ARNOLD M. LANDSBOROUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

FIRST QUESTION.

Should the Trial Court have withdrawn the testimony from the Jury and have discharged the defendant, or have instructed the Jury to discharge the defendant, there being no evidence to prove the allegations of the indictment?

A bottle of Morphine Sulphate tablets was produced by the Respondent at the trial, identified, offered and received as Exhibit. The Respondent's own witness testified that the contents of that bottle were not purchased by George Bishop whom Agents had followed to Petitioner's home.

There was not one word of testimony offered at the trial by the United States relating to the source of the morphine sulphate tablets in question. All that the Government can rely on is the wording of the Statute to the effect that:

"the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a

violation of this subsection by the person in whose possession same may be found."

The effect of the Statute referring to "prima facie evidence of a violation" is merely to raise a presumption that there has been a violation. This places upon the accused the necessity of going forward with his evidence but the burden of proof does not shift to the accused. This is the rule of law in Ohio. See *Farm Bureau Mutual Automobile Insurance Co. v. The Alms & Doepke Co.*, 30 O. O. 387 at page 389, decided in 1944. It is also the general rule elsewhere. 20 *Am. Jur.* 136, Section 133, states as follows:

> "A presumption of law which arises upon the pleading or during the course of the trial after the introduction of evidence may aid a party in discharge of the burden of proof cast upon him and shift to his adversary the burden of explanation or of going on with the case, but does not, as a general rule, shift the burden of proof; a presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, and when such explanation is made, the duty is upon the plaintiff to take up the burden which the law cast upon him and sustain the issue by a preponderance of the evidence. A presumption which operates in the plaintiff's favor casts upon the defendant the burden of producing evidence to meet the plaintiff's *prima facie* case, and not the burden of proof in the sense of the risk of non-persuasion, which remains with the plaintiff throughout the trial."

The Supreme Court of the United States refers to the Statute in question in the case at bar in the case of *Casey vs. U. S.*, 276 U. S. 413 (1927). At page 418 in referring to the presumption arising from the wording of this specific Statute, the Court states:

> "Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime the statute creates."

According to the *Casey* case, the burden was upon Dr. Landsborough to explain and justify the possession of the morphine sulphate tablets. This Dr. Landsborough did by his own testimony and the testimony of Mrs. Landsborough.

After this evidence was given, there was no rebuttal thereof nor any other evidence to overcome it. All the prosecution had was a presumption and it was met by positive testimony offered by the defense. 17 *O. J.* 146, Section 116 states as follows:

> "If that *prima facie* case is met by evidence tending to negative it, it then becomes the duty of the party upon whom the true burden lies to strengthen the *prima facie* case or overcome the proof offered."

When the accused produced evidence which reasonably tended to show that the fact was not as presumed, the presumption became insufficient to support a conviction. A case directly in point which expresses the rule as to presumption is that of *Tyrrell vs. Prudential Insurance Co.*, 109 Vt. 6 (1937).

At page 403 the Court states:

> "A disputable presumption is a rule of law to be laid down by the Court, which shifts to the party against whom it operates the burden of evidence, merely. It points out the party on whom lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed, and the fact in question is to be established by evidence as are other questions of fact, without aid from the presumption, which has become *functus officio*. To translate this statement into the language of this Court, all such presumptions are locative, merely. A presumption, of itself alone, contributes no evidence and has no probative quality. It takes the place of evidence, temporarily at least, but if and when enough rebutting evidence is admitted to make a question for the Jury on the fact involved, the presumption disappears and goes for naught. In such a case the

presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena."

The presumption relied upon by the prosecution after all is only a presumption and has no probative value whatsoever. It is not evidence. There was no evidence of purchase as the Trial Court stated. Against that presumption, the accused had in his favor a presumption also, a presumption of innocence. He also produced positive, undenied evidence which overcame the presumption raised by the statute. This being true, the defense respectfully maintains that not only was there insufficient evidence to find the accused guilty beyond a reasonable doubt but there was no evidence whatsoever to support the conviction.

SECOND QUESTION.

Should the conviction in this case be reversed since the evidence fails to show the issue and use of a search warrant and warrant to arrest?

In Volume 3, *Am. Jur.*, Section 248, page 33 under Appeal and Error it is stated:

"In the exercise of its power to do so, an appellate Court will consider questions not raised or reserved in the trial Court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights. The Court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the question is imperfectly presented."

The case of *Weems vs. United States*, 217 U. S. 349, is authority for the above statement, and in fact, it was held in the case of *Wiborg vs. United States*, 163 U. S. 632 that:

"want of evidence to sustain a verdict against some of the defendants in a criminal case may be considered as ground of reversal although no motion or request was made in the lower Court to instruct the Jury to find for them."

In the instant case, however, defendant's rights were sought to be preserved by the motion of defendant's counsel to withdraw the evidence from the consideration of the Jury and to discharge the defendant, which was done with the intent, and it would seem properly so, of objecting to the admission of, and challenging any and all evidence offered by the Government.

It is said in 47 *Am. Jur.*, Section 6, page 505, under Searches and Seizures, that the Fourth Amendment to the Federal Constitution provides that:

"the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Amendment is stated to be a limitation upon the powers of the Federal Government.

It is stated in 47 *Am. Jur.*, Section 52, page 532:

"an unreasonable search has therefore been defined as an examination or inspection without authority of law of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or for some evidence of guilt, to be used in the prosecution of a criminal action. The essence of the offense is the invasion of a man's rights of personal security, personal liberty and private property."

Cited are the cases of *People vs. DeCesare*, 220 Mich. 417; *Weeks vs. United States*, 232 U. S. 383.

It has been held by the United States Supreme Court that search warrants may not be used as a means of gain-

ing access to a man's house or office and papers solely for the purpose of searching to secure evidence to be used against him in a criminal proceeding. *Gouled vs. United States,* 255 U. S. 298, and *United States vs. Lefkowitz,* 285 U. S. 452.

The Government had offered no evidence at the trial below of the issue or use of any search warrants or warrants for the arrest of the defendant. The two Government Agents who made the arrest and Dr. Landsborough all testified as to everything that was said and done in Dr. Landsborough's home on the day of the seizure of the morphine sulphate tablets produced in evidence. This testimony at no time referred to any search warrant or warrant for arrest. There was no conversation at the home relative thereto as is required by law.

On January 5, 1948, this Court decided the case of *United States vs. Michael DiRe,* 332 U. S. 581. The arrest and part of the search had been conducted by Officers when DiRe was seated in an automobile; was taken to the Police Station where further search disclosed counterfeit ration stamps in DiRe's clothing. At the trial, DiRe failed to move to suppress evidence and the question of unlawful search and seizure was apparently first raised in the Circuit Court of Appeals.

The Court, in Opinion by Mr. Justice Jackson, held that:

> "arrest and search without warrant where no offense is being perpetrated, or no known felony committed is illegal * * * a search is not to be made legal by what it turns up * * * the conviction based on evidence so obtained cannot stand."

Petitioner, at no time on January 20, 1947 was committing any offense, or violating any law and certainly not as charged in the indictment.

Petitioner submits that the decisions of the District Court and Circuit Court of Appeals, in the case at bar, are contrary to the opinions of this Court in the *DiRe* case,

the *Anne Johnson* case and the *Jack Trupiano* case cited above. The facts of the instant case and the *Anne Johnson* case are quite similar. In the *Johnson* case, the Narcotic Officers had likewise been informed of the use of opium in the hotel in which, when the Officers entered, they smelled burning opium. They were admitted to Anne Johnson's room where opium and smoking apparatus were found upon search by the Officers who had no warrants to search or to arrest. Anne Johnson was convicted, and successfully challenged the conviction as a violation of the rights secured to her by the Fourth Amendment to the Constitution.

In both cases, contraband was found.

In both cases, there was information leading to the later discovery.

In both cases, there were searches, arrests and seizures without the issue and use of warrants.

CONCLUSION.

This case should not have been submitted to the Jury as the legal presumption of guilt by the alleged possession of contraband was completely and effectively explained away by defendant below, Petitioner herein.

The Respondent offered no additional evidence, hence there was nothing to submit to the Jury.

The Agents had no legal authority to enter the dwelling, search and arrest, hence the Petitioner was unlawfully detained and he should then have been discharged.

The Petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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